UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CYSTIC FIBROSIS PHARMACY, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 4:16-CV-01167-CEJ
	)	
EXPRESS SCRIPTS, INC.,	)	
	)	
Defendant.	)	

PLAINTIFF CYSTIC FIBROSIS PHARMACY, INC.'S MEMORANDUM IN OPPOSITION TO EXPRESS SCRIPTS, INC.'S MOTION TO DISMISS

Now comes Cystic Fibrosis Pharmacy, Inc., ("Cystic Fibrosis") by and through counsel, and hereby files this Memorandum in Opposition to Express Scripts, Inc.'s ("ESI") Motion to Dismiss Counts II-VI and VIII of Cystic Fibrosis' First Amended Complaint. ESI's continued claims that more specificity is required or necessary is blatantly wrong. This case far exceeds a contract case and ESI's continued attempts to narrow this case to contractual issues improperly seeks to dismiss claims that are viable and hold ESI accountable for multiple, ongoing acts of wrongdoing. This is not proper, nor can it be permitted.

I. LEGAL STANDARD

Pursuant to *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*, civil complaints should "set out sufficient factual matter to show that the claim is facially plausible." *Fowler v. UPMC Shadyside*, 578 F.3d 203, 209 (3rd Cir. 2009); *Bell Atl. V. Twombly,* 550 U.S. 544, 555 (2007); *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1939 (2009). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S.Ct. at 1949. The court must take the complaint's allegations as true, no matter how incredulous the court may be. *Twombly,* at 555.

To succeed on a Rule 12(b)(6) motion, the movant must establish "to a certainty that no relief could be granted under any set of facts which could be proved." *D.P. Enter., Inc. v. Bucks Country Cmty. College*, 725 F.2d 943, 944 (3rd Cir. 1984). As a result, "[g]ranting a motion to dismiss is a 'disfavored' practice." *In re OODC, LLC*, 321 B.R. 128, 134 (Bankr. D. Del. 2005). "The issue is not whether a plaintiff will ultimately prevail but whether the claim is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

II. ANALYSIS

A. The Breach of Implied Covenant of Good Faith and Fair Dealing (Count II) is a Viable Claim.

Defendant's argument for dismissal rests completely upon the premise that it is a "vague regurgitation of the breach of contract claim" and that all matters are expressly addressed under the contract. However, this shortsighted, self-serving argument does not comport with reality. Missouri law always implies a covenant of good faith and fear dealings to contracts. *Martin v. Prier Brass Manufacturing Co.,* 710 S.W.2d 466, 473 (Mo. App. 1986). In other words, a party to a contract is expressly prohibited from using the express terms of a contract to evade the contract or deny another party an expected benefit of a contract. *Wulfing v. Kansas City Couther Ind., Inc.*, 842 S.W.2d 133, 157 (Mo. App. 1992).

Review of the Amended Complaint shows the following allegations that are not disposed of by the breach of contract claim:

- ESI's market share has increased to administration of the vast majority of the market including insured prescriptions and mail order prescriptions (Amended Complaint ¶16);
- ESI now manages drug benefits for approximately 95% of all Americans with insurance (Id. at ¶17);
- ESI engaged in anti-competitive and unlawful behavior (Id. at ¶18);

- ESI controls all aspects of prescription drug plans for approximately 95% of insured Americans (Id.);

- ESI now operates a mail order pharmacy and "takes affirmative steps to direct to the flow of prescriptions to its own pharmacy to increase market share, slow down the costs, and eliminate competition." (Id. at ¶19.); and

- ESI is shutting pharmacies out of the market – despite contracts for the provision of pharmaceutical services – for personal gain. (Id. at ¶20. 62.)

ESI's continued insistence that the contract limits all rights and recovery in this case only highlights ESI's continued attempts to shield itself from liability for its wrongful acts is inapposite with reality. In fact, the 8th District has specifically noted that the covenant of good faith and fair dealing acts "as a gap filler to deal with circumstances not contemplated by the parties at the time of contracting." *U.S. Basin Electric,* 248 F.3d 781, 796 (8th Dist. 2001). It is acknowledged that while Defendant's actions are wholly unreasonable, the covenant does not impose a reasonable requirement. Id. However, Defendant is prohibited from taking an "opportunistic advantage in a way that could not have been contemplated at the time of [the contract's] drafting, and which therefore was not resolved explicitly by the parties." Id. citing *Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting,* 908 F.2d 1351, 1357 (7th Cir. 1990).

Here, there is no dispute that the parties had a contract for the provision of pharmaceuticals to ESI members. ESI is terminating that contract without any basis in law or fact. Rather than discuss the issues, ESI continues to breach the very terms of its agreement further by refusing to abide by dispute resolution procedures that it wrote into the contract. ESI did not provide notice nor a cure. More importantly, as alleged in the Amended Complaint, ESI has breached the implied covenant of good faith and fair dealing by eliminating Plaintiff, redirecting prescriptions for self-gain, and controlling the market to the exclusion of Plaintiff for personal benefit. These actions exceed the contract and were not contemplated nor covered as part of the contract. This opportunistic advantage is actionable outside of the contract and was never resolved explicitly by the parties in the Agreement. As such, Count II is viable and cannot be dismissed.

B. The Unjust Enrichment (Count III) Claim is a Viable Claim.

A successful unjust enrichment claim requires that Plaintiff show that it conferred a benefit on ESI and that ESI accepted and retained the benefit under circumstances that were unjust. *AIG Agency, Inc. v. Mo. Gen. ins. Agency, Inc.*, 474 S.W. 3d 222 (E.D. Mo. 2015). It "is a separate and distinct cause of action from breach of contract." *Rental Co. v. Carter Group, Inc.* 399 S.W.3d 63 (2013). In this case, Plaintiff conferred the benefit of patients upon Defendants. Specifically, ESI who manages up to 95% of all insured prescriptions in the United States made determinations on whether or not Plaintiff was an in-network provider for pharmaceuticals. ESI excluded Plaintiff to redirect and divert the patients of Plaintiff – that were known (name, date, address, prescription usages, etc.) – to pharmacies where ESI had a more favorable reimbursement contracts, to its own wholly or partly owned pharmacies, or to exclude coverage entirely or partly thereby saving prescription reimbursement monies. (See Amended Complaint ¶¶16-20, 67.) Plaintiff had invested in these patient relationships for the present and long term. (Id. at ¶68.) ESI's elimination of Plaintiff as a provider is merely manipulation to obtain the benefits conferred upon ESI (identification of the patients, locations, prescriptions, etc.) and ESI maintains the benefits unjustly. This poaching, diversion, and elimination of benefits is unjust enrichment. (Id. at ¶¶70-71.)

C. The Tortious Interference Claims (Counts IV and VIII) Are Viable.

It is undisputed that a successful claim for tortious interference with a contract or a business expectancy includes interference with a contract or expectancy, ESI's knowledge of the contract and/or expectancy; ESI's intentional interference; absence of any justification for the breach; and resulting damages to Plaintiff. *Quality Res., Inc.*, 2014 WL 417997, *4. Here, despite baseless allegations to the contrary, Plaintiff has stated a claim for tortious interference with its patient base and third party resources to maintain the relationships with the patient base. (Amended Complaint, ¶¶2, 19-20, 73-78.)

The allegation by ESI that Plaintiff failed to allege an interference with patients and third party resources is fatally flawed and inaccurate. Again, ESI's refusal to acknowledge patient interruption and inability to obtain prescription services from Plaintiff does not mean it does not exist. Furthermore, it is completely incongruent to acknowledge that a pharmacy does not have a relationship with patients or medicine providers. Yet, ESI claims a complete termination (unjustly) does not interfere with patients obtaining prescriptions or Plaintiff's relationships in securing products and servicing patients is preposterous. The tortious interference claim is viable and cannot be dismissed.

Further, ESI's claim that Plaintiff could be terminated without cause does not eliminate the claim or absolve Plaintiff of liability. Here, the contract was not terminated without cause. Moreover, Plaintiff indicates that the rationale and actions of ESI were tortious and the claims asserted support this contention.

D. Counts V and VI Are Viable Claims.

The declaratory judgment action addresses the dispute over terms, obligations, duties, rights and responsibilities of the parties in the Provider Agreement. While Plaintiff believes this is an independent cause of action, should this court wish to find that it is articulated in the other substantive counts, Plaintiff will pursue the remedy within those claims. Likewise, the claim for injunctive relief can be asserted as a remedy to the other substantive claims, if this court so orders. That said, the claims are properly before this court and should not be dismissed.

III. CONCLUSION

WHEREFORE, Cystic Fibrosis Pharmacy, Inc., respectfully requests that this Court deny Defendant's motion to dismiss Counts II-VI and VIII of the Amended Complaint as Plaintiff has pled "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged" and Defendant has failed to meet the difficult requirements of Civ.R. 12(b)(6). Iqbal, 129 S.Ct. at 1949.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 10th day of November, 2016, the foregoing was filed electronically with the Clerk of Court, to be served by operation of the Court's electronic filing system.

/s/ Anthony J. Calamunci
Anthony J. Calamunci